IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.4557 OF 2007.

Ambadas Vithal Vaydande,
Age 35 years, Occ.: Business,
R/o. 3772, Santpeth Behind
School No.7, Ambedkar Nagar,
Pandharpur, Dist. Solapur. ... Petitioner.

Versus.

1. Dnyaraj Sitaram Sarvogod,
   Age: 32 years, Occ.: Business,
   R/o. 3677/78, Ambedkar Nagar,
   Pandharpur, Dist.Solapur.

2. The Chief Executive Officer,
   Pandharpur Municipal Council.

3. The Collector, Dist.Solapur.

4. Arvind Nabilal Kamble,
   Adult, Occ.: Business,
   R/o. Annubhau Sathe Chowk,
   Mangalwedha Link Road,
   Pandharpur.

5. Pandurang Ambadas Khadke,
   Adult, Occ.: Business,
   R/o. Sambhaji Chowk,
   Pandharpur. ... Respondents.

Shri Surel Shah for the Petitioner.

Shri Ajay A.Joshi for the Respondent No.1.

CORAM : ABHAY S.OKA, J.

DATED : 6th July, 2007.

JUDGMENT.:

1. The submissions of the learned Counsel appearing for the parties were heard on 26th June 2007. By this writ petition under Article 227 of the Constitution of India, the Petitioner has taken exception to the Judgment and order dated 22nd December 2006 passed by

the Collector, Solapur which is confirmed in Appeal by order dated 18th May 2007.

2, With a view to appreciate the submissions made by the Advocates appearing for the parties, it will be necessary to refer to the facts of the case. The Petitioner contested the General Ward Election of the Pandharpur Municipal Council held on 19th November 2006. The 1st Respondent, 2nd Respondent and the 3rd Respondents were candidates who also contested the election against the Petitioner. On 21st November 2006, result of the election was declared. The Petitioner was elected by majority of 65 votes.

3. The 1st Respondent filed an application before the Collector, Solapur invoking section 44 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Township Act, 1965 (hereinafter referred to as "the said Act"). The contention raised by the 1st Respondent is that the Petitioner was the father of two daughters and a son. It was stated that the youngest daughter of the Petitioner was born on 9th October 2006. It is, therefore, contended that the Petitioner was disqualified to contest the election. It was alleged that the fact that the Petitioner had three children was suppressed by him while filing the nomination paper. A reply was filed by the Petitioner to the said

Application. The Petitioner did not dispute that he was the father of three children. He, however, contended that on 24th October 2006 he gave his elder daughter in adoption to one Shri Narendra Narayan Gaikwad, who is his brother-in-law. It is stated that the deed of adoption was duly registered on 27th October 2006. It is contended that with effect from 24th October 2006, the Petitioner's elder daughter Karuna has ceased to have any relationship with him.

4. The Collector passed an order dated 22nd December 2006 holding that on the date on which the Petitioner contested the election, he was the natural father of three children and therefore, he had incurred disqualification under section 16(1)(k) of the said Act. The order passed by the Collector has been confirmed in Appeal. It must be stated here that the Collector did not accept the case made out by the 1st Respondent that he should be declared as elected in place of the Petitioner. The Collector declared that as a consequence of disqualification of the Petitioner, the post held by him had become vacant.

5. The learned Advocate for the Petitioner invited my attention to section 12 of the Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as "the said Act of 1956"). He submitted that in view of

section 12 of the said Act of 1956, on 24th October 2006 the Petitioner's daughter severed all her ties with the family of the Petitioner and for all purposes she became the child of the said Narendra Narayan Gaikwad. He submitted that the second explanation to clause (k) of sub-section (1) of section 16 of the said Act of 1956 has been misread by the Collector. He pointed that the said explanation lays down that a child does not include an adopted child or children. The learned Advocate for the Respondent No.1 placed reliance on the decision of the Apex Court in the case of Javed and others v/s. State of Haryana and others [(2003) 8 S.C.C. 369]. He submitted that in view of the clear pronouncement of law by the Apex Court, no case was made out for interference. The learned Advocate for the Petitioner submitted that the Apex Court was dealing with a different enactment which does not have an explanation which is similar to the second explanation to clause (k) of section 16(1) of the said Act. He submitted that the Apex Court has not considered section 12 of the said Act of 1956.

6. I have considered the submissions. There is no dispute between the parties that on 9th October 2006, the Petitioner became a father of a third child. The only question to be considered is as to what is the effect of adoption made on 24th October 2006 by which

the Petitioner gave his elder daughter in adoption to one Shri Narendra Gaikwad.

7. Clause (k) of sub-section (1) of section 16 of the said Act of 1956 reads thus:

> "16. (1) No person shall be qualified to become a Councillor whether by election or nomination, who,
> - . (k) has more than two children;
> . Provided that, a person having more than two children, on the date of commencement of the Maharashtra Municipal Corporations and Municipal Councils, Nagar Panchayats and industrial Townships (Second Amendment) Act, 1995 (hereinafter in this clause referred to as "the date of such commencement"), shall not be disqualified under this clause so long as the number of children he had on the date of such commencement does not increase.
> . Provided further that, a child or more than one child born in a single delivery within the period of one year from the date of such commencement shall not be taken into consideration for the purpose of disqualification mentioned in this clause.
> Explanation.- For the purposes of this clause,-
> . (i) where a couple has only one child on or

> after the date of such commencement, any number of children born out of a single subsequent delivery shall be deemed to be one entity;
>
> . (ii) "child" does not include an adopted child or children."

A reliance has been placed on the second explanation to clause (k). The Petitioner is not disputing the fact that but for the adoption, he would have incurred disqualification. The effect of the second explanation will be that if a child of a candidate is not his natural child and is an adopted child, the said child will not be considered while considering whether the candidate has incurred a disqualification. The reliance placed on the said explanation will not help the Petitioner. It is an admitted position that on 9th October 2006, the Petitioner became the natural father of the third child. It will be necessary to refer to the decision of the Apex Court in the case of Javed (supra). The Apex Court was dealing with the following provisions of the Haryana Panchayati Raj Act, 1994:

> "175. (1) No person shall be a Sarpanch, Up-Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such who -

> . (q) has more than two living children;
>
> . Provided that a person having more than two children on or up to the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified.
>
> 177. (1) If any member of a Gram Panchayat, Panchayat Samiti or Zila Parishad -
>
> . (a) who is elected, as such, was subject to any of the disqualifications, mentioned in Section 175.
>
> . (b) during the term for which he has been elected, incurs any of the disqualifications, mentioned in Section 175,
>
> ..."

The Apex Court dealt with the constitutional validity of the aforesaid provision. The Apex Court considered various aspects of the said statutory provision. In paragraph 62 of the decision, the Apex Court observed as under:

> 62. It was submitted that the enactment has created serious problems in the rural population as couples desirous of contesting an election but having living children more than two, are feeling compelled to give them in adoption. Subject to what has already been

> stated hereinabove, **we may add that disqualification is attracted no sooner a third child is born and is living after two living children. Merely because the couple has parted with one child by giving the child away in adoption, the disqualification does not come to an end. While interpreting the scope of disqualification we shall have to keep in view the evil sought to be cured and purpose sought to be achieved by the enactment. If the person sought to be disqualified is responsible for or has given birth to children more than two who are living then merely because one or more of them are given in adoption the disqualification is not wiped out."** (Emphasis added).

This decision will squarely apply to the present case.

8. On a plain reading of the provision of clause (k) of sub-section (1) of section 16 of the said Act, it is obvious that the disqualification is incurred when a candidate becomes a father or mother of a third child. The emphasis is on having more than two living children. The object of the provision is to ensure that a candidate should not have more than two living children. For the purpose of succession, inheritance and other allied aspects, section 12 of the said Act of 1956 will

operate and for all purposes an adopted child will the child of the adoptive parents. However, such an adoption will not save a candidate from disqualification as the fact remains that he has more than two living children. Therefore, the adoption will not save the Petitioner from disqualification incurred by him as a result of birth of the third child on 9th October 2006.

9. Therefore, no fault can be found with the concurrent orders passed by the authorities below. The petition is accordingly rejected.

Judge.